Supreme Court, U.S.
FILED
NOV 18 2008
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No. 08-831

In the Supreme Court of the United States

GREGORY LANGLEY

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1 Whether an undercover videotape made by a now unavailable confidential informant is testimonial evidence for purposes of exclusion pursuant to the Sixth Amendment's Confrontation Clause.

2 Whether the Petitioner's equal protection rights were violated due to the exclusion of African-American jurors from the venire.

LIST OF PARTIES

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In the Supreme Court of the United States

No.
GREGORY LANGLEY

PETITIONER

VERSUS

COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gregory Langley respectfully prays that a writ of certiorari issue to review the order of the Kentucky Supreme Court which affirmed the opinion of the Henderson Circuit Court of the Commonwealth of Kentucky holding that the majority of an undercover video taken by a now unavailable confidential informant was not testimonial and thus not a violation of the Petitioner's right to confront witnesses against him pursuant to the Confrontation Clause of the Sixth Amendment. The Petitioner also seeks review of the Kentucky Supreme Court's ruling that the testimonial portion of the videotape was harmless error. Furthermore, the Petitioner asserts that his equal protection rights were violated due to an unconstitutional array of venirepersons at the trial court level due to the fact that the Commonwealth exercised a preemptory

challenge on an African-American juror in violation of this Court's precedent set forth in *Batson v. Kentucky*, 476 U.S. 79, (1986).

STATEMENT OF JURISDICTION

On December 8, 2006, the Henderson Circuit Court issued an order denying Petitioner a new trial. On March 20, 2008, the Supreme Court of Kentucky case number 2006-SC-853-MR denied relief to Petitioner Langley.

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. § 1257 which states: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States..." and Rule 13 et seq of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

> shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Material Facts

On October 12, 2006, in the Henderson Circuit Court, in Henderson, Kentucky, Gregory Langley, hereinafter Petitioner was convicted of the offenses of Trafficking in a Controlled Substance (Methamphetamine) and First Degree Persistent Felony Offender. All relevant parties to the action were African American including the Petitioner and the only eye witness. The initial venire panel contained two African American women,

one of whom was struck for cause, the other whom the Commonwealth exercised a preemptory challenge upon. The Petitioner asserts the exercise of the preemptory challenge on the only remaining African American on the venire was in violation of Petitioner's equal protection rights under the Fourteenth Amendment and a violation of this Court's holding in *Batson v. Kentucky*, 476 U.S. 79, (1986)..

At some time prior to trial, the Commonwealth's only witness to the alleged drug transaction, the confidential informant, informed the Commonwealth that he would not testify. Prior to opening statements, the Henderson Circuit Court conducted a closed hearing to determine if the confidential informant's refusal to testify was the result of an invocation of some privilege or whether he was merely refusing to testify. The Court determined that the confidential informant was just refusing to testify and was not invoking any known privilege. At this point the Commonwealth stated that it could meet its burden of proof without the confidential informant by showing a videotape allegedly made by the informant on the day of the alleged drug transaction. It is the introduction of this videotape which Petitioner claims was reversible error in that the content of the videotape was testimonial in nature in its entirety and thus the Petitioner's Sixth Amendment Right to Confront his accuser was violated by his inability to cross examine the confidential informant in this case. The Petitioner was subsequently convicted of both charges and was sentenced to ten years on the persistent felony offender charge and twenty years on the trafficking charge, for a total sentence of thirty years.

The Petitioner filed a timely appeal to the Kentucky Supreme Court and on March 20, 2008, the Court issued a non-published opinion holding that Petitioner's Fourteenth Amendments rights were not violated by the Commonwealth exercising the preemptory challenge on the African American venireperson and that the trial court did not err in admitting the videotape with the exception of one harmless error. The harmless error in admitting the videotape, according to the Kentucky Supreme Court was the portion where the confidential informant names the Petitioner as the individual from whom the methamphetamine was purchased. This error, according to the Kentucky Supreme Court was harmless because the erroneously admitted evidence was "harmless beyond a reasonable doubt" and the evidence presented against the Petitioner was "compelling to prove his guilt."

On March 31, 2008 Petitioner filed a Petition for Rehearing before the Kentucky Supreme Court and on August 21, 2008 the Court denied the Petition for Rehearing. This Petition for a Writ of Certiorari follows.

B. Questions of Law Presented for Review

I Whether an undercover videotape made by a now unavailable confidential informant is testimonial evidence for purposes of exclusion pursuant to the Sixth Amendment's Confrontation Clause.

The Confrontation Clause holds that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

The Confrontation Clause requires three essential conditions on testimony offered against a defendant. First, it must be given in the presence of the defendant. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Second, the defendant must have the opportunity to cross examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Third the witness must give the testimony at trial unless he or she is unable to testify. Id *Davis v. Washington*, 547 U.S. 813 (2006) clarified that the Sixth Amendment confrontation clause ruling presented in the *Crawford* decision applies to statements made to law enforcement officers through an affidavit prepared at a scene. Essentially, the *Davis* decision extended the *Crawford* decision not only to confrontational statements, but to tangible items such as sworn documents and in Mr. Langley's case, a video recording that can be authenticated by law enforcement officers should the witness become unavailable before trial. Under *Davis*, it appears that any statement made to or elicited by a police officer, other law-enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to later criminal prosecutions is "testimonial." It is the Petitioner's position that the entire video admitted by the trial court in this case was testimonial in nature and thus should have been excluded as evidence as violative of the confrontation clause of the Sixth Amendment.

Pursuant to *Crawford v. Washington*, 541 U.S. 36, 59 (2004), "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Regarding the issue of

whether the informant statements were testimonial, the rule in *Crawford* has been applied to cases involving the out-of-court statement of an informant. *See United States v. Cromer*, 389 F.3d 662 (6th Cir. Mich. 2004). In *Cromer*, the Sixth Circuit Court of Appeals held that "statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant." *Id.* at 670-71. In determining that such a statement was testimonial, this Court analyzed the opinion in *Crawford*. It noted that the "Court emphasized that, 'an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.'" *Cromer*, 389 F.3d at 672 (citing *Crawford*, 124 S.Ct. at 1364).

In addition, the Court held that statements of a confidential informant are almost always testimonial in nature and are thus subject to the Confrontation Clause.

> Statements of a confidential informant are testimonial. Indeed, such statements fall squarely within the paradigm: A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential- i.e., that not even his identity is disclosed to the defendant heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance

> of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause.
>
> *United States v. Cromer*, 389 F.3d 662 (6th Cir. Mich. 2004)

Furthermore, commentators have held that if a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial. Richard D. Friedman & Bridget McCormack, Dial-In Testimony 150 U. Pa. L. Rev. 1171, 1240. "A statement made knowingly to the authorities that describes criminal activity is almost always testimonial." Emphasis added Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1042-43 (1998)

In *United States v. Hearn*, 500 F.3d 479, 484 (6th Cir. Tenn. 2007) the Sixth Circuit Court of Appeals reaffirmed *Cromer*, *supra* and held

> The Sixth Amendment protects a defendant's right to confront witnesses. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). In *United States v. Cromer*, this court held that a defendant suffered a Sixth Amendment confrontation violation "[b] ecause there was a testimonial, out-of-court statement [from a confidential informant], offered to establish the truth of the matter asserted, and [the defendant] was provided no opportunity to cross-examine the [confidential informant]."

389 F.3d 662, 677-78 (6th Cir. 2004). The same occurred here; Hearn did not have an opportunity to cross-examine the confidential informants who, through the police officers, were able to accuse Hearn of intending to traffic drugs. In *United States v. Pugh*, 405 F.3d 390 (6th Cir. Oh. 2005) moreover, this court held that prosecutors violated a defendant's Sixth Amendment rights because there was no conceivable reason (besides offering testimonial, out-of-court statements about a defendant's guilt) for admitting a positive identification of a defendant. 405 F.3d at 400. In this case, similarly, there was no conceivable reason, besides implicating Hearn, for the officers to testify that a confidential informant told them that Hearn placed the drugs in his car and was driving to Nashville to sell them.

The second prong of the *Crawford* analysis requires a determination of whether the statement was offered for the truth of the matter asserted. *United States v. Pugh*, 405 F.3d 390. In *Cromer*, *supra* any potential doubts about whether statements were offered for the truth of the matter asserted was resolved by the prosecutor's closing argument, wherein the government's counsel argued that Cromer was guilty because he matched the description offered by the confidential informant. *United States v. Cromer*, 389 F.3d 662. In the case *sub judice*, the Commonwealth's closing argument is similar to the facts in *Cromer*. In this case, the Commonwealth argued that the Petitioner was guilty because the confidential informant stated that he received the methamphetamine from Petitioner Langley. In closing argument, the Commonwealth also argued the following:

"The video is the best evidence as to what occurred;" The video shows the informant in car with defendant. The Commonwealth in their closing statement relied heavily on the testimonial hearsay statements of the confidential informant. On the end of the tape Detective Duval even asks the confidential informant: "who did it come from?" Mr Johnson answered this question by referring to the Petitioner by name, Jermaine. Because the prosecutor in this case in closing argument relied on the statements of the confidential informant in order to argue that Mr. Langley had sold the methamphetamine, it is the petitioner's assertion that the statements were offered for the truth of the matter asserted thus satisfying the second prong under *Crawford*.

The Kentucky Supreme Court held that the portion of the videotape in which the confidential informant names Petitioner Langley as the person from whom the methamphetamine was purchased, was testimonial in nature and should have been excluded pursuant to *Crawford*. However, the Court also held that under the harmless error analysis, the error was harmless. "In determining whether an error is harmless, the reviewing court must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *United States v. Hardy*, 228 F.3d 745, 751 (6th Cir. Oh. 2000) (citing *Kotteakos v. United States*, 328 U.S. 750, 764,90 L. Ed. 1557,66 S.Ct. 1239 (1946)) (alteration in original). In other words, it must find "that it was more probable than not that the error materially affected the verdict." *United States v. Trujillo*, 376 F.3d 593, 611 (6th Cir. Mich. 2004). *United States v. Pugh*, 405 F.3d 390 (6th Cir. Oh. 2005). It is the Petitioner's assertion that it was more probable than not that the admission of the confidential

informant's testimonial hearsay, naming the petitioner as the individual who sold the methamphetamine, materially affected the verdict in this case. Accordingly, the Petitioner's Sixth Amendment's right to confront his accuser was violated and he is entitled to a new trial.

II Whether the Petitioner's equal protection rights were violated due to the exclusion of African-American jurors from the venire.

The Petitioner in this case, Gregory Jermaine Langley, is an African-American male. During the initial jury venire, the Commonwealth sought to exclude the only two African-American jurors. The first African-American juror was excluded for cause and thus *Batson v. Kentucky*, 476 U.S. 79 (1986) does not apply. However, the second African-American juror, Ms. Poindexter was excluded by the Commonwealth on a preemptory basis, thus triggering the standard as set forth in *Batson*, *supra*. Pursuant to *Batson*, the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Batson citing Strauder v. West Virginia*, 100 U.S. 303 (1880). *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:

> "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question and third, in light of the parties' submissions, the trial court must determine

> whether the defendant has shown purposeful discrimination.'" *Miller-El v. Dretke*, 545 U.S. 231 supra, at 277, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Thomas, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 328-329, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

In *Batson*, this Court held that a defendant may establish a prima facie case of discrimination on proof that members of the defendant's race were substantially underrepresented on the venire from which the jury was drawn.

> In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus v. Georgia*, supra, at 552; see *Castaneda v. Partida*, *supra*, at 494; *Washington v. Davis*, *supra*, at 241; *Alexander v. Louisiana*, supra, at 629-631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.

The Sixth Amendment requires that the jury be a fair cross-section of the community. "Large distinctive groups" such as minorities and women may not be categorically excluded nor substantially underrepresented. In *Duren v. Missouri*, 439 U.S. 357 (1979) this Court invalidated a rule where women could opt out of juries upon request. *Duren* stated the

test for determining a violation of the fair cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Missouri's rule, which resulted in the clear statistical underrepresentation of women on jury panels, violated the Sixth Amendment's fair cross-section requirement.

In the case *sub judice*, it is the Petitioner's assertion that the Commonwealth of Kentucky sought to exclude the only African-American juror from the prospective jury panel. Pursuant to *Batson*, the Commonwealth's exclusion of all of the African-American jurors satisfies the prima facie requirements of intentional, non race neutral discrimination and the burden of proof than shifts to the Commonwealth to prove otherwise. It is the Petitioner's assertion that the Commonwealth did not offer an adequate race-neutral basis for excluding the only remaining African-American juror, Ms. Poindexter. Because members of the Petitioner's race were substantially underrepresented on the venire, it is the Petitioner's position that he has made a prima facie showing of discriminatory intent on behalf of the Commonwealth of Kentucky. Accordingly, the Petitioner in this case was denied a fair trial and his right to equal protection was denied by the racially based exclusion of African-American jurors.

CONCLUSION

Based on the foregoing argument, the Petitioner Gregory Jermaine Langley respectfully requests this Honorable Court to grant certiorari in the above-styled action.

Respectfully submitted,

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In the Supreme Court of the United States

GREGORY LANGLEY

Petitioner

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COMMONWEALTH OF KENTUCKY

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI APPENDIX

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Commonwealth of Kentucky
Henderson Circuit Court
Indictment No. 06-CR-00192

Commonwealth of Kentucky — Plaintiff

v.

Gregory Jermaine Langley — Defendant

Order

This cause comes before the Court upon the Defendant's Motion for a New Trial. The Court having reviewed the record and being otherwise sufficiently advised, the Court hereby ORDERS as follows:

The defendant, Gregory J. Langley, was tried on October 12, 2006. The jury found him guilty of First Degree Trafficking in a Controlled Substance (Second Offense) and being a First Degree Persistent Felony Offender. The defendant then filed a motion for a new trial. Under RCr 10.02, the court may grant a new trial "for any cause which prevented the defendant from getting a fair trial, or if required in the interest of justice."

First, the defendant argues the Court erred in removing all African-Americans from the prospective jury panel without sufficient showing of impartiality in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). There were two African-Americans on the panel. One of them was struck for cause, without objection by the defense. The Commonwealth struck the other during peremptory strikes. The defense objected; and the Commonwealth proffered its race neutral reasons for striking her, namely that she knew both the defendant and the confidential informant, that she appeared nervous and the Commonwealth believed it had prosecuted two of her family members. After hearing this explana-

tion, the Court concluded that the Commonwealth had not engaged in purposeful discrimination and overruled the objection. See *Thomas v. Commonwealth*, Ky., 153 S.W. 3d 772 (2004). After a review of the record here, the Court believes that this ruling was appropriate.

The confidential informant, Deshawn Johnson, refused to testify before the jury. After a hearing, the Court determined that Johnson was not claiming any testimonial privilege and found him in contempt of court. Based on his adamant refusals, the Court decided not to bring him before the jury and instead gave the jury an admonishment that Johnson had refused to testify and that the Court had found him in contempt. The defendant argues that this was in error. After a review of the record the Court believes that, whether or not the defendant was asserting a valid privilege, the Court acted properly in not bringing Johnson before the jury. *Clayton v. Commonwealth*, Ky., 786 S.W. 2d 866 (1990); *People v. Newton*, 940 P. 2d 1065, 1067 (Colo. App. 1996).

In lieu of the confidential informant's direct testimony, the Commonwealth proffered a DVD recording of the "controlled buy" he performed for the police. The defendant argues that this video was not properly authenticated. The record indicates that both officers who participated in the recording testified, Det. Jamie Duvall and Det. Ron Adams. The officers testified as to: how the digital recorder worked, how they placed it on the confidential informant and started the recording themselves, that the recording process could not be interfered with once started without stopping the recording completely, that the police stopped the recording once the informant had returned, and that they retrieved the recording device from the informant and downloaded the information from the device onto a po-

lice computer. The recording was continuous, showing no interruptions. The officer testified that they made no changes, deletions, or additions, and the recording offered into evidence was a fair and accurate representation of the recording they retrieved from the informant. Based on this the Court believes that the video was properly authenticated. *United States v. Stephens*, 202 F.Supp.2d 1361 (N.D. Ga. 2002).

The defendant further argues that the Court erred in not suppressing the recording due to violation of the eavesdropping statute. KRS 526.010 et seq. After a review of the record, the Court believes that the Commonwealth sufficiently proved that the recording was made with the consent of at least one of the participants. *Carrier v. Commonwealth*, Ky. App., 607 S.W. 2d 115, 117 (1980). Both officers testified that the informant gave every indication that he consented to the recorder being placed on his person.

The defendant also objects that the informant's statements on the video were hearsay and admission of the tape and its contents violated his right to confront his accuser. At trial, the defendant objected that playing the video of the buy violated his right of confrontation. He also made a motion in limine to prevent the officers from discussing inculpatory statements Johnson had made on the video; the Commonwealth argued that the informant's refusal to testify or answer any questions made his statements on the video admissible as prior inconsistent statements. *Mayes v. Commonwealth*, Ky., 563 S.W. 2d 4, 7 (1978). The Court overruled the first objection (to playing the video) but sustained the defendant's motion as to the officers' testimony. However, there was no hearsay objection to specific inculpatory statements on the video itself. After a review of the record, the Court does not believe the video of the controlled buy was entered in error.

The defendant also argues that the Commonwealth did not timely disclose any agreement it had with the informant. Before opening statements, the defendant moved that the Commonwealth disclose any agreement it had with the informant. The Commonwealth stated that there was no agreement with regard to Johnson's testimony. However, Det. Adams stated that the police offered not to press charges against Johnson for some narcotics he had sold if he would perform controlled buys for them. The defendant requested to question the police about this arrangement before the jury. The Court sustained this request over the Commonwealth's objection. Subsequently, both Duvall and Adams testified that the informant was "working off" his own potential drug charges by performing controlled buys for the police. Even presuming the Commonwealth did not properly disclose this arrangement before the trial, the Court does not believe that there was any error that created an inherently unfair trial as the defense was allowed to bring this evidence before the jury.

The defendant objects to other alleged hearsay from the officers, namely a discussion Det. Duvall had with the informant over the telephone. Duvall heard the informant call someone on the phone to arrange a buy. Duvall testified that he recognized the voice of the third person to be Gregory Jermaine Langley, whom he knew from previous encounters. The Court has reviewed the testimony and believes that Duvall's testimony that he recognized the person the informant called to be Langley was not admitted in error. KRE 901(b)(5); *Howard v. Commonwealth*, Ky.App., 787 S.W. 2d 264 (1989). Furthermore, the Court does not believe that there was any error in admitting the testimony about this conversation which prevented the defendant from receiving a fair trial.

The defendant also objects that the chain of custody for the drugs placed into evidence was not properly established without the testimony of the informant. However, the officer testified that the informant was searched before he was sent out to make the buy, that he was videotaped from then until he returned, and the officer retrieved that alleged drugs from the informant. The Court believes that the Commonwealth satisfactorily established chain of custody of the drugs from the time the police obtained it. It was for the jury to decide what the weight of the evidence was. *Thomas v. Commonwealth*, Ky., 153 S.W. 3d 772, 781 (2004).

The defendant objects that the video of the buy given to them in discovery was substantively different than the video of the buy admitted into evidence. The Commonwealth advised the Court that although there may have been technical differences in the format, there was not any substantive difference in the content of the two videos. The defense could not describe a specific substantive difference in the two videos, except for differences in format. The Court overruled the motion in limine, and the CD videos given to the defense in discovery were admitted as an avowal exhibit. The Court concludes that even if there was error, it is insufficient to require a new trial. The Court also concludes that there was no error in failing to give the jury a spoliation instruction on this issue. No evidence was missing or destroyed.

Finally, the defendant argues that the Court erred in allowing the jurors to review only portions of the video during their deliberations, when the power was interrupted twice. The Court finds no error here. The jurors viewed the entire video during the case in chief. They asked to review the video again during deliberations. While they watched the video, the power

to the courtroom went out twice. It was impossible to "fast forward" the DVD to the point where the power went off, so it would have to be played from the beginning. The second time this happened, the jury indicated that they did not need to see more of the video. The Court asked counsel whether they would prefer to have the jury see the video from the beginning. Both parties said they had no objection to and in fact agreed to allow the jury to resume deliberations without seeing the entire video again.

In summary, the Court believed that the trial in this case was not inherently unfair or unjust. The Motion for a New Trial is OVERRULED.

Entered on this the 8th day of December 2006.

Judge, Henderson Circuit Court

I hereby certify that the foregoing order was served upon the parties of record by mailing true copies thereof to the following persons at their post office addresses as shown: 1) Hon. William I. Markwell, 446 North Main Street, Henderson, Kentucky 42420; 2) Hon. Dax R. Womack, 304 First Street, Henderson, Kentucky 42420, all postage prepaid on this the 11th day of December 2006.

Ruth London, Clerk
By: SS K. Casey D.C.

B1

Supreme Court of Kentucky
2006-SC-000853-MR

Gregory Jermaine Langley — Appellant

v. On Appeal from Henderson Circuit Court
Honorable Stephen A. Hayden, Judge
No. 06-CR-00192

Commonwealth of Kentucky — Appellee

Memorandum Opinion of the Court

AFFIRMING

Gregory Jermaine Langley appeals as a matter of right from a November 6, 2006 Judgment of the Henderson Circuit Court convicting him of first degree trafficking in a controlled substance (2nd offense) and being a first degree persistent felony offender (PFO). The Commonwealth alleged that on the afternoon of October 5, 2005, Langley sold methamphetamine to a Henderson Police Department confidential informant at the corner of Vine Street and Adams Street in Henderson, Kentucky. Although the informant refused to testify at Langley's trial and was ultimately found in contempt of court, the Commonwealth nonetheless obtained a guilty verdict by introducing a video of the drug transaction, which was created by a hidden video recording unit worn by the confidential informant during the buy, and also the testimony of the two Henderson police detectives who interacted with the informant. Langley was subsequently sentenced to a total of thirty years in prison.

On appeal, Langley contends that the trial court erred by (1) allowing the Commonwealth to exclude all the African-American jurors from the jury panel in violation of his equal protection rights; (2) admitting the videotape of the alleged drug transaction despite the confidential informant's refusal to testify, which, Langley argues, constitutes error because (a) its introduction violated his rights under the Confrontation Clause, (b) the video was not properly authenticated at trial, and (c) the Commonwealth did not prove the required chain of custody; (3) not giving a spoliation instruction to the jury; (4) allowing the Commonwealth to introduce certain testimony by the Henderson Police officers in violation of the hearsay rules and the eavesdropping statute; (5) failing to find a discovery violation after the Commonwealth withheld evidence that the confidential informant had been given a deal in exchange for his cooperation; and (6) not showing the entirety of the video after the jury requested to have it replayed during their deliberations. Finally, Langley argues that he was severely prejudiced by the cumulative effect of the aforementioned errors and that as a result, he is entitled to a new trial. Although we agree with Langley that the trial court erred in admitting the final portion of the videotape, during which the confidential informant made a testimonial statement, after reviewing all the evidence presented at trial, we conclude that this error was harmless. Finding that Langley's other arguments were either not preserved for review or did not constitute error, we affirm.

RELEVANT FACTS

On October 5, 2005, Detective Jamie Duvall of the Henderson Police Department spoke with a confidential informant on the telephone about setting up a controlled drug buy from Jermaine Langley. While Duvall was still on the line, the informant called Langley using his phone's three-way calling feature. Detective Duvall, who recognized Langley's voice because he had known Langley for sixteen years, listened in as the informant and Langley briefly discussed the drug transaction. Following this conversation, Duvall understood that the informant would need $100 to buy an eighth of an ounce of methamphetamine from Langley. Detective Duvall, along with another Henderson police detective, Ron Adams, then met with the confidential informant at a designated location. Detective Adams testified at trial that after searching the informant's person and car and finding no drugs or contraband, he equipped the informant with the hidden video recording unit. After activating the recording feature, Adams gave the informant $100, and the informant then left to go meet Langley.

The confidential informant was gone for approximately half an hour, during which the hidden video unit made a continuous recording. For the first eighteen minutes of the thirty-two minute video, the informant drove through Henderson. Eventually, he pulled over at the corner of Vine and Adams Street[1],

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[1]In Langley's criminal complaint, Detective Adams signed an affidavit stating that the drug buy occurred in the area of Vine Street and Alves Street. At trial, Adams testified that he was off by one street in his report, and the drug transaction actually occurred on the corner of Vine and Adams Street.

exited his vehicle, and started walking across the front yard of property on which a trailer is visible. The informant then got into the passenger side of a car while Langley got into the driver's side. The two stayed in the car for approximately thirty seconds. Although no drugs can be viewed from the video and there was no discussion regarding drugs, as the informant was exiting the car, Langley can be seen gathering some money and placing the bills in the console between the front seats of the car.

The confidential informant then got back into his car and drove away. Approximately twelve minutes later, the informant pulled alongside Duvall and Adams, who were in a red mini-van. Without getting out of their cars, Duvall and the informant agreed to meet at a less visible location. When the two detectives arrived at the agreed upon location, the informant got into their mini-van and handed the officers a plastic bag from his pocket, which contained methamphetamine. Adams then asked the informant who gave him the drugs. The informant responded "Jermaine." Next, Adams asked the informant where the transaction happened. The informant told the officers that it occurred on "the corner of Vine and Adams."

Based on the video recording and the affidavit of Detective Adams, on January 4, 2006, the Henderson District Court issued an arrest warrant against Langley for first degree trafficking. Five days later, on January 9, 2006, Langley was arrested. On August 1, 2006, the Henderson County Grand Jury indicted Langley for first degree trafficking in a controlled substance (2nd offense) and for being a persistent felony offender. On October 12, 2007, Langley's trial began in the Henderson Circuit Court. Although the confidential informant refused to testify during Langley's trial, the Commonwealth

nevertheless introduced evidence of the alleged drug transaction through the videotape and the testimony of Detective Duvall and Adams. After hearing all the evidence, the jury returned a verdict finding Langley guilty of both charges and recommended that he be sentenced to thirty years in prison. After denying Langley's motion for a Judgment Notwithstanding the Verdict, the Henderson Circuit Court entered Langley's judgment of conviction and sentence on November 6, 2006, sentencing him to thirty years as recommended by the jury. This appeal followed.

ANALYSIS

I. The Commonwealth Did Not Commit a *Batson* Violation In Striking Juror B For Cause Or In Using a Peremptory Strike On Juror P.

A. Striking Juror B For Cause Was Within The Discretion of The Trial Court and Did Not Constitute a *Batson* Violation.

During its voir dire, the Commonwealth asked the potential jurors if any of them knew the defendant, Jermaine Langley. Two people raised their hands: Juror B and Juror P. The first to address the court was Juror B, an African-American woman who had grown up with Langley and was related to some of his family members through marriage. After disclosing this relationship to the court, the Commonwealth asked Juror B if given her knowledge of the defendant, it would be difficult for her to give Langley or the Commonwealth a fair trial. She responded that it would be difficult. The parties then approached the bench, where Juror B further stated that she did not believe she could set aside her prior knowledge and be impartial during the trial.

The Commonwealth moved for Juror B to be struck for cause. After specifically asking Langley's counsel if he had any objection to this strike, to which he answered "no," the trial court struck Juror B for cause.

As Juror B left the courtroom, Juror P, also an African-American woman who knew the defendant from growing up together in Henderson, approached the bench. Before the court began questioning Juror P, however, Langley's counsel stepped forward and stated that he wanted to preserve an objection to the Commonwealth's attempt to exclude black people from the jury based on their race. The trial judge then sought clarification from Langley's counsel, stating that "on the last one [involving Juror B], I thought you had no objection, is that correct or incorrect?" Langley's counsel responded, "that's fine, on that one [involving Juror B], but I would like a continuing objection on every individual of color."

Regarding the trial court's strike of Juror B, Langley stated in his brief that "the Commonwealth suggested the relationship [between Juror B and the defendant] would prevent her from being fair and impartial" and that "the Defendant refuted the Commonwealth's contention." Langley has misstated the facts in this instance. A review of the trial record reveals that Juror B personally felt she could not be an impartial juror and clearly expressed this bias to the trial court. Langley's counsel recognized this conflict, did not refute Juror B's obvious bias, and had no objection to her being struck for cause. Furthermore, Langley erroneously states that striking Juror B for cause constituted a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). First, the holding in *Batson* prohibits attorneys from using preemptory challenges in a discriminatory manner and is not relevant when jurors are struck for cause. See *Id.* at 82. Second, as noted previously, Langley

did not object to Juror B being struck for cause during voir dire. Thus, this claim of error is not preserved for review and this Court will not consider it on appeal. RCr 9.22; *Edmonds v. Commonwealth*, 906 S.W.2d 343, 346 (Ky. 1995).

B. Having Provided a Race-Neutral Reason for Excluding Juror P, the Commonwealth Did Not Commit a *Batson* Violation In Using Its Peremptory Strike.

After Juror B was struck for cause, Juror P, who also raised her hand and acknowledged that she knew the defendant, approached the bench. Although Juror P told the court that she knew Langley and his family from growing up together in Henderson, she also stated that she could be fair and impartial and decide the case based solely on the evidence presented at trial. The trial court then asked Juror P if she knew the confidential informant. Juror P responded affirmatively, saying that she also knew the informant from growing up in Henderson but that she would not give his testimony any more weight or credibility because of this prior knowledge. Juror P then returned to the venire.

After the counsel exercised their strikes, Langley's counsel approached the bench and objected to the exclusion of Juror P, arguing that the jury did not constitute a fair representation of Langley's community. The Commonwealth responded that they struck Juror P because she knew both Langley and the confidential informant and because they were concerned that she would be unable to put aside her previous predispositions in deciding the case. The trial court then asked the Commonwealth on the record if Juror P's race was a factor in her exclusion and if she would have still been stricken

if she were white. The prosecutor answered that Juror P's race was not a factor and that he believed it would be difficult for anyone, white or black, who knew both the defendant and the confidential informant in this case to be completely impartial. In response, defense counsel stated that he thought there was another young lady on the jury who indicated she knew Mr. Langley and she was not struck. One Commonwealth attorney responded that he did not remember her, "but it could be." Next, the Commonwealth stated that their decision to excuse Juror P was also based on their own knowledge that two of her relatives had been prosecuted and convicted in the Henderson Circuit Court. The trial judge then asked defense counsel to restate his specific objection on the record. Langley's counsel stated that "the jury pool does not make up or comprise an accurate representation of the peers of the defendant." The trial court overruled this objection, found that the Commonwealth had given a race-neutral reason for excluding Juror P, and ruled that the use of this peremptory strike was valid.

Langley argues on appeal that since he rebutted the Commonwealth's proffered race-neutral justification for excluding Juror P, the trial court erred by not inquiring further to determine whether the prosecutor engaged in racial discrimination. Under *Batson*, after a defendant makes a prima facie showing of racial discrimination, the prosecutor must state a race-neutral reason for the peremptory strike. *Batson*, 476 U.S. at 93-97, 106 S. Ct. at 1722-23. Once this occurs, the trial court must determine whether the defendant has adequately shown that the prosecutor engaged in purposeful discrimination. *Id.* at 98. A trial judge's rulings under a *Batson* challenge, including whether the prosecutor offered a race-neutral reason and whether the defendant showed purposeful discrimination, will not be disturbed on appeal unless

they are found to be clearly erroneous. *Washington v. Commonwealth*, 34 S.W.3d 376, 379-380 (Ky. 2000).

In this case, since the prosecutor stated his reason for striking Juror P, we will proceed directly to the second step under *Batson*. *Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004); *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (1992). Langley argues that after the Commonwealth stated its race-neutral reasons, *i.e.*, that Juror P knew both the defendant and the confidential informant and that two of her relatives had been convicted previously by the trial court, he rebutted those justifications and shifted the burden back to the Commonwealth. According to the trial record, Langley's only response to the Commonwealth was that he thought there was another woman on the jury who had acknowledged that she knew the defendant, but she was not struck. Our review of the voir dire in this case reveals that in fact, Juror B and Juror P were the only two people who raised their hands and stated that they knew the defendant. In addition, Langley argues in his brief that the Commonwealth's assertion regarding the conviction of Juror P's relatives was a pretext because she did not have a brother who had ever been convicted of a felony in Henderson County. This argument is irrelevant for two reasons. First, the prosecutor never mentioned Juror P's brother; he only stated that two of her relatives had been convicted by the trial court. Second, Langley did not raise this argument in the trial court and offers it up for the first time on appeal. Therefore, Langley's argument that he sufficiently rebutted the Commonwealth's race-neutral justification for excluding Juror P is totally without merit.

After hearing the Commonwealth's reasons for striking Juror P, the trial court concluded that the grounds were race-neutral and that the peremptory

strike was valid. Langley identifies nothing in the record to suggest that the trial judge was clearly erroneous in making this ruling. Although Juror P did state that she felt she could be impartial, she had grown up with both the defendant and the confidential informant. Furthermore, the Commonwealth attorney stated that Juror P's relatives' prior convictions in the trial court added to his decision to exclude her. Finding that this conclusion did not constitute clear error, we affirm the trial court's ruling that the Commonwealth did not engage in purposeful discrimination and that no *Batson* violation occurred.

II. With One Harmless Exception, the Trial Court Did Not Err In Admitting the Videotape Or In Denying Langley's Motion to Dismiss For Failure to Prove Chain of Custody.

A. Although Admitting the Final Portion of the Videotape Constituted Error Under *Crawford*, That Error Was Harmless.

Langley argues on appeal that since he was unable to cross-examine the confidential informant at trial, the admission of the videotape prevented him from being able to confront his accuser and violated his rights under the Confrontation Clause of the Sixth Amendment. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that in order to comply with the Confrontation Clause, a witness's testimonial statement can only be admitted if the witness is unavailable and if the defendant had a prior opportunity to cross-examine the witness. Although the U.S. Supreme Court has not yet fully defined "testimonial statements," the Court has recognized that testimonial statements result from police inter-

rogations that are not made in the face of an "ongoing emergency," but rather, occur in order "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006).

The videotape of which Langley complains contains few statements made by the confidential informant. The video begins with the informant, Duvall and Adams inside the detectives' mini-van. After Adams states the date and time, and that he is going to give the informant $100 to purchase methamphetamine from Jermaine Langley, the informant exits the van and drives off in his car. The informant does not say anything audible until he pulls in front of the trailer and gets into a car with Langley. While they are seated in the car, the informant and Langley briefly discuss a trip to Atlanta, although exactly what the informant says is difficult to understand. After leaving Langley and continuing to drive around Henderson, the informant then pulls alongside the detectives and they discuss where to meet. Once the detectives arrive at the meeting point, the informant gets back into their mini-van. Adams then asks the informant who he got the drugs from, to which the informant replies "Jermaine." The detective also asks the informant where the transaction occurred. The informant responds, "the corner of Vine and Adams."

Both the Seventh and the Third Circuit United States Courts of Appeal have found that since a confidential informant is aware that his statements are being recorded in order to foster criminal prosecution, the informant's recorded statements may be "testimonial" as the Supreme Court has employed that term. United *States v. Nettles*, 476 F.3d 508, 517 (7th Cir. 2007); *United States v. Hendricks*, 395 F.3d 173 (3rd Cir. 2005) In *Hendricks*, however, the Third Circuit Specified that

if the informant's statements are made as part of an "integrated conversation" with the defendant and are introduced not to prove their truth but to place the defendant's statements into context, then the statements are not hearsay and their admission does not violate the Confrontation Clause. *Hendricks*, 395 F.3d at 184. In adopting this holding, we find that the statements made by the informant during his conversation with Langley were not offered for their truth and did not violate Langley's rights under the Confrontation Clause. Thus, the portion of the videotape that shows the confidential informant engaged in a transaction with Langley was admissible even though the informant did not testify at trial.

The confidential informant's statement to Detective Adams after the alleged drug transaction, however, did constitute testimonial hearsay and should have been redacted from the video. The U.S. Supreme Court has been clear that accusatory statements elicited by law enforcement officers in non-emergency situations are testimonial. *Davis*, 126 S. Ct. at 2273-74; *Crawford*, 541 U.S. at 53, 124 S. Ct. at 1365. In Langley's case, the confidential informant's statement naming Jermaine as the person who gave him the drugs was in direct response to Adams's question, "who did that come from?" Furthermore, the informant's post-transaction statement to Adams was not reasonably required to place any of Langley's statements into context. Although this final portion of the video did include a testimonial statement by the confidential informant and should have been excluded under *Crawford*, we agree with the Commonwealth that this error was harmless beyond a reasonable doubt.

This Court has held that "[v]iolations of the confrontation clause of the Sixth Amendment under

the United States Constitution and Section 11 of the Kentucky Constitution are subject to a harmless error analysis." *Greene v. Commonwealth*, 197 S.W.3d 76, 83 (Ky. 2006). If in light of all the evidence presented at trial, the erroneously admitted evidence was harmless beyond a reasonable doubt, then its admission constitutes a harmless error and is not grounds for reversal. *Heard v. Commonwealth*, 217 S.W.3d 240, 244 (Ky. 2007). Aside from the final portion of the videotape, the evidence presented against Langley at trial was compelling to prove his guilt. Both Detective Adams and Duvall testified about arranging a controlled buy between the informant and Langley, searching the informant and then equipping him with the video recording unit, and receiving a baggie of methamphetamine from the informant following his encounter with Langley. The admissible portion of the video showed that from the time the informant exited the detectives' mini-van until he returned, he met with only one person—Jermaine Langley. Furthermore, the fact that the informant admitted at the end of the video that he received the drugs from Langley was cumulative since the videotape showed only one person from whom he could have received the drugs—Jermaine Langley. Therefore, due to the substantial evidence admitted against Langley at trial, the erroneous admission of the informant's testimonial statement was harmless beyond a reasonable doubt.[2]

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[2]Having concluded that admitting this portion of the video constituted harmless error, we decline to address the Commonwealth's argument that Langley forfeited his right to confront his accuser by procuring the unavailability of the confidential informant as a witness.

B. The Videotape Was Properly Authenticated By Detective Duvall's and Detective Adam's Testimonies.

Langley argues that since the "creator" of the video, *i.e.*, the confidential informant, refused to testify at trial, the Commonwealth failed to properly authenticate the videotape and it should not have been admitted. After Langley raised this issue in a pre-trial motion, the trial court held a hearing to determine whether the Commonwealth could properly authenticate the videotape without the informant's testimony. During this hearing, Duvall explained that once the recording unit is turned on, it can be stopped by the person wearing it, but once it is stopped, it will not start recording again and a break will show up when the video is downloaded. Duvall stated that after the unit was placed on the confidential informant, it was turned on at 2:48 p.m. and turned off at approximately 3:20 p.m., which accurately reflects the 32-minute length of the videotape. Duvall testified that once the informant returned, he removedthe recording unit, which was intact and had not been altered, took the unit to the police station, downloaded the video, and viewed a continuous feed with no stops or interruptions. After hearing the detectives' testimony and viewing the videotape in it's entirety, the trial court determined that the video had been properly authenticated per KRE 901(a).

KRE 901(a) states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The proponent only needs to make a prima facie showing of authenticity in order to meet this burden, and on appeal, a trial court's ruling on the authentication of evidence is reviewed for abuse

of discretion. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). In Langley's case, for the video to be properly authenticated, the Commonwealth needed to make a prima facie showing that the video reflected what actually occurred after the informant left the officers' mini-van. Although Langley is correct that neither detective was present with the informant as a majority of the video was being recorded, due to their testimony regarding the mechanics of the recording device, there was sufficient evidence before the trial judge to support a finding that the video accurately recorded the informant's actions. The detectives were present when the video began recording and when it was turned off; the mechanics of the recording unit allowed them to testify that it was not stopped, altered, or turned off while the informant was away from their presence; and after downloading and viewing the video, the detectives testified that there was a continuous, 32-minute recording, which accounted for the total time the informant was away from the officers. Thus, due to the detailed testimony given by Detective Duvall and Adams, the trial court did not abuse its discretion when it found that the videotape was properly authenticated, and we affirm its ruling on this matter.

C. Langley's Chain of Custody Dismissal Motion, Which Was Actually A Sufficiency of the Evidence Argument, Was Properly Denied.

Langley argues on appeal that since the video neither shows drugs being exchanged nor reveals a discussion of drugs between the informant and himself, the Commonwealth failed to prove an essential element of the charge, *i.e.*, that he provided the informant with methamphetamine. Prior to trial, Langley filed a mo-

tion to dismiss with the trial court, asserting this same argument. Although Langley continues to argue in his brief that he is challenging the chain of custody of the drugs, the substance of his argument actually deals with the sufficiency of the evidence. Langley's ultimate contention is that without the testimony of the confidential informant, the Commonwealth had no way of proving that he ever sold drugs to the informant since the videotape is ambiguous and the officers' testimony is speculative.

Assuming that Langley intended to challenge the sufficiency of the evidence, we find that his argument has no merit. When a defendant challenges the sufficiency of the evidence on appeal, the appellate court must decide if under the evidence as a whole, it was clearly unreasonable for a juror to find guild. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In Langley's case, the Commonwealth presented evidence that Langley spoke with the confidential informant on the telephone in order to set up the drug buy; that the informant was searched prior to the transaction and did not have drugs with him; that the informant was given $100 to buy drugs from Langley; that Langley and the informant met briefly to effectuate the exchange; and that the informant returned from his encounter with Langley with a baggie of methamphetamine. Although the videotape did not capture the drugs changing hands and the informant refused to verify this by testifying, all other evidence presented by the Commonwealth pointed to the conclusion that the informant got the drugs from Langley. Therefore, it was not clearly unreasonable for the jury to find Langley guilty of trafficking in a controlled substance, and the trial court did not err in denying Langley's motion to dismiss.

III. Since Langley's and the Commonwealth's Versions of the Video Were Identical, the Trial Court Did Not Err In Denying Langley's Request For A Spoliation Instruction.

During trial, the Commonwealth played the video of the alleged drug transaction that was made by the hidden recording device. Although the Commonwealth played the video at trial using a DVD, it had previously provided to Langley a copy of the video using two CD-ROMs. Langley argues on appeal that because of a time differential between the CD-ROMs he received from the Commonwealth and the DVD of the alleged drug transaction that was actually played for the jury, he was entitled to a spoliation instruction. Langley raised this argument in one of his pre-trial motions, noting that the length of his tow CD-ROMs totaled 37 minutes while the Commonwealth's DVD totaled 32 minutes. The Commonwealth responded to this motion by explaining that when the recording unit was downloaded onto the computer, it produced three segments: a segment lasting 27 minutes and 5 seconds and two segments lasting 5 minutes and 52 seconds. However, the two five-minute segments are duplicates of the same recording, and when the Commonwealth played the DVD for the jury, it did not re-play the second five-minute segment. Although the trial judge questioned Langley's counsel as to whether he could point to any substantive differences between the CD-ROMs he received and the Commonwealth's DVD, he merely stated that since he was not an expert, he could not say for sure whether there were differences or not. The trial court then entered Langley's CD-ROMs into the record by way of avowal and denied his request for a spoliation instruction.

Langley correctly notes that a spoliation instruction is appropriate "where the issue of destroyed or missing evidence has arisen." *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1977). However, after reviewing both the Commonwealth's DVD and Langley's CD-ROMs, this Court is convinced that they are completely identical and the time discrepancy is due to the duplicative five-minute segments as explained by the Commonwealth at trial.

When the Commonwealth's DVD is played, it lists three titles: one lasting 27 minutes and 5 seconds and two lasting 5 minutes and 52 seconds. When Langley's first CD-ROM is played, it lists one title lasting 5 minutes and 52 seconds. When Langley's second CD-ROM is played, it lists two titles: the first lasting 5 minutes and 52 seconds and the second lasting 27 minutes and 6 seconds. Although the last segment on Langley's CD-ROM is one second longer than the Commonwealth's DVD, this Court could not find any difference between these versions. Thus, both versions contain one segment lasting approximately 27 minutes and 5 seconds, and two segments lasting 5 minutes and 52 seconds. Although Langley's version is split between two CD-ROMs and the order of the segments is reversed on his second CD-ROM, the fact remains that all the segments are identical copies and portray the exact same sequence of events. In addition, when the lengths of all the segments are totaled, including the duplicative five-minute segments, they add up to 37 minutes. Even though the Commonwealth only showed a 32-minute video to the jury, it did so because the last five-minute segment would have been a repeat of what the jury had just seen. Therefore, since there is no indication that the video evidence was destroyed or missing, a spoliation instruction was not appropriate in this instance and the trial court did not err in denying Langley's request.

IV. The Trial Court Did Not Err By Admitting Testimony In Violation of the Hearsay Rules or the Eavesdropping Statute.

A. Neither Detective Adams Nor Detective Duvall Testified About What the Confidential Informant Said During His Phone Conversation with Langley and Thus, Their Testimony Was not Hearsay.

In the Commonwealth's opening statement, the prosecutor stated that Detective Duvall, in listening in on the informant's three-way call to set up the controlled buy, heard Langley tell the informant that he would sell him a certain amount of methamphetamine for $100. Defense counsel objected to this statement, arguing that statements made by the confidential informant are hearsay and should not be admitted. Even though the prosecutor stated that he had only referred to what the defendant had said, not the informant, the trial court agreed with Langley and "sustained the objection as to what [the confidential informant] said." On appeal, Langley now contends that when Detective Adams and Duvall testified about this phone conversation, they violated the trial court's prior ruling and the hearsay rules.

In making this argument, Langley misrepresents two important facts. First, the trial court never ruled that the Commonwealth could not discuss this phone conversation, but rather, it held that the prosecutor could not mention or elicit any statements made by the confidential informant. Second, in testifying about this phone conversation, the detectives never mentioned any statements by the confidential informant. The Commonwealth did not question Detective Adams

about the phone conversation between Langley and the informant. On cross-examination, defense counsel asked Adams about this phone call, but he responded that Duvall handled that portion and he was not party to the conversation. When Detective Duvall was asked by the Commonwealth about this call, he stated that after the informant telephoned Langley, he understood that the informant would need $100 to buy methamphetamine from Langley. At no point during either of these testimonies did the detectives mention statements made by the confidential informant. Thus, the Commonwealth did not introduce any inadmissible hearsay testimony and no error occurred with regard to this issue.

B. Langley Never Raised the Issue that Introducing the Phone Conversation Violated the Eavesdropping Statute and Thus, This Claim of Error Is Not Preserved for Appeal.

Although Langley's brief cites to portions of the record where he raised this issue at trial, this Court has been unable to find a single instance where he argued to the trial court that the confidential informant's lack of consent with regard to Detective Duvall listening in on his phone conversation with Langley amounted to a violation of KRS 526.010 (the eavesdropping statute). As mentioned previously, Langley did object to the Commonwealth introducing statements made by the informant during this phone conversation on the basis of the hearsay rules. In addition, Langley did object to introduction of the videotape on the basis that it violated the eavesdropping statute. However, even when Detective Duvall testified about the phone

conversation, Langley never stated that the introduction of this evidence violated the eavesdropping statute. Because this issue was not preserved for review, this Court will not consider it on appeal. RCr 9.22; *Edmonds*, 906 S.W.2d at 346.

C. Since Detective Adams Testified That the Confident Informant Cooperated Fully in Carrying Out the Controlled Drug Buy, Including Wearing the Hidden Recording Device, the Informant's Consent Was Implied and No Violation of the Eavesdropping Statute Occurred.

In One of his pre-trial motions, Langley argued that since the confidential informant had refused to testify at trial, the Commonwealth had no way of proving that he consented to the creation of the video of the alleged drug transaction. Langley stressed that without proof of the confidential informant's consent, the detectives engaged in unlawful eavesdropping per KRS 526.010. In response to this motion, the trial court asked Detective Adams several questions regarding the confidential informant's willingness to wear a hidden recording device during the controlled drug buy. Detective Adams stated that based on his personal observations, the confidential informant was fully cooperative with regard to wearing the recording device and that he was willing to do whatever was necessary to make the drug buy happen. The trial court then ruled that based on Detective Adams's testimony and his own observation of the videotape, the confidential informant had consented to the making of the video and its admission did not violate KRS 526.010.

KRS 526.020 classifies eavesdropping as a Class D felony. KRS 526.010 states that "'eavesdrop' means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other devise." Although this Court has not had the occasion to rule on whether an informant's consent can be shown through the testimony of law enforcement officers, the Kentucky Court of Appeals held in *Carrier v. Commonwealth*, 607 S.W.2d 115, 118 (Ky. App. 1980), that "the testimony of the informant himself is not necessary in order to establish his consent." In *Carrier*, the informant had initiated incriminating phone conversations with the defendant that were electronically recorded by the police. *Id.* at 116-117. Although the informant refused to testify at trial, "three law enforcement officers testified that [the informant] gave his permission for the electronic recording of the conversation, that is was done freely and voluntarily, without any sign of duress." *Id.* at 118. We find the holding in *Carrier* persuasive. Therefore, since Detective Adams testified that the confidential informant voluntarily wore the recording device and since the videotape itself indicated that the informant consented to the recording system, we affirm the trial court's ruling that the informant consented to the creation of the videotape and that no unlawful eavesdropping occurred.

V. Defense Counsel Was Told About the Informant's Deal Prior to Trial and Allowed to Cross-Examine the Detectives Regarding This Issue, Thus, No *Brady* Violation Occurred.

On the morning of his trial, Langley moved the trial court to admonish the Commonwealth or dismiss the case due to the prosecutor's failure to disclose that the confidential informant was given a deal for his cooperation in the case against Langley. Detective Adams then verified for the court that the informant was "working off" some of his prior charges by acting as a confidential informant for the police. Langley's counsel then asked the trial judge if he would be able to cross-examine the detectives on this subject during trial. Over the Commonwealth's objection, the trial court granted Langley's request and stated that he could question the detectives on the consideration the informant received for his cooperation. Despite the fact that Langley's counsel questioned both Detective Adams and Detective Duvall at trial regarding the informant being able to "work off" his prior criminal charges, Langley now argues on appeal that the Commonwealth's failure to disclose this information constitutes reversible error under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The U.S. Supreme Court held in *Brady* that if the prosecution withholds material evidence from the defense, it has violated the defendant's due process rights. *Id.* at 87.

In *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985), the Supreme Court stated:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

The prohibition in *Brady* has no application to Langley's case since the information about the informant's agreement with the Commonwealth was actually disclosed to the defense as well as to the jury. Even though the informant's deal was not disclosed until the morning of trial, since defense counsel was able to cross-examine both detectives regarding this issue, no prejudice resulted from the late discovery. Thus, the trial court did not err in failing to find a *Brady* violation.

VI. Langley Expressly Waived His Objection to the Jury's Not Viewing the Entirety of the Videotape At Trial and Thus, That Issue Is not Preserved.

After Langley's trial was concluded and the jury had begun their deliberations, the trial court informed the parties that the jury had requested to view the videotape of the alleged drug transaction again. However, while the jury was watching the video, the electrical power in the courtroom went out twice, allowing the jury to only watch the first 18 minutes of the video. Because the device used to play the video did not have a fast-forward feature, prior to starting the video from the beginning for a third time, the trial court asked the jurors if anyone wanted to restart the video. Other

than one jury member asking whether they could fast-forward to the point at which the video stopped, no one raised their hands. The trial court then explained to the Commonwealth and the defense counsel that if either of them had an objection to not letting the jury complete their viewing of the videotape, the trial court would replay the video in its entirety. Both the Commonwealth and Langley's counsel stated that they had no objection. The trial judge then stated on the record that both parties had waived any objection to the tape not being played in its entirety. Both attorneys stated that was correct, no further objections were made, and the jury was allowed to return to its deliberations.

Langley now argues in his brief, without mentioning that he waived any objection on this issue at trial, that the trial court's failure to replay the video in its entirety violated his right to a fair trial. This Court does not view lightly defense counsel's complete lack of candor in asserting this claim. Langley not only failed to preserve this issue at the trial court, but he expressly waived it. Therefore, this Court will not consider this claim of error on appeal. RCr 9.22; *Edmonds*, 906 S.W.2d at 346.

VII. Langley Is Not Entitled to a New Trial Based On Cumulative Error.

Finally, Langley argues that he was severely prejudiced by the cumulative effect of the previously claimed errors and that as a result, he is entitled to a new trial. Having found that only one, minor error occurred during Langley's trial and that that error was harmless, his argument that the cumulative effect of the trial court's errors entitles him to a new trial is without merit. *Tamme v. Commonwealth*, 973 S.W.2d

13, 40 (Ky. 1998) (holding that an "insufficient harmless error" will neither constitute cumulative error nor mandate reversal). In sum, despite the admission of a testimonial hearsay statement through the videotape, Langley received a fundamentally fair trial and there was no cumulative error on which to grant his request for a new trial.

CONCLUSION

The final statement made by the confidential informant in the video was in direct response to police interrogation and thus, was testimonial hearsay. Since the confidential informant refused to testify at trial and Langley had no prior opportunity to cross-examine him, the trial court erred in admitting this statement. However, based on the totality of evidence introduced against Langley at trial and the cumulative nature of the informant's statement, this error was harmless. With regard to Langley's other allegations of error, we find that the trial court did not err and Langley has no grounds for relief. Thus, the November 6, 2006 Judgment of the Henderson Circuit Court convicting Langley of trafficking in a controlled substance and of being a persistent felony offender is affirmed.

All sitting. All concur.

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